was wholly unacceptable, that the accident was caused as a result of the appellant suddenly without any warning turning into Jalan Abdul Malek from Paul Street when he knocked into the driver of the motor scooter and the impact took place on the appellant's off-side. That in my view is clear evidence of inconsiderate driving.

A Magistrate sitting alone exercises the function of both Judge and Jury. The point which Mr. Rintoul argued is that evidence taken at the spot, in spite of the fact that the appellant was given all facilities for cross-examination, was wholly inadmissible because the place itself he contended is not a public place. The place where part of the trial took place was within the local area over which the Magistrate had jurisdiction. As such, it could not be contended that the trial was held in a wrong local area within the meaning of section 419 of the Criminal Procedure Code and the trial is not vitiated because witnesses in his presence gave demonstrations and answered questions on oath subject to cross-examination. The Magistrate himself having attended the view and seen the demonstrations of witness, it cannot be said that he overlooked anything material and his judgment cannot be challenged as coming within the exception of *Tameshwar* v. *The Queen*[1].

It is contended that the evidence was inadmissible for the simple reason that part of the trial took place elsewhere than in open court and Mr. Rintoul relied on *Scott* v. *Scott*[2].

The trial was partly held at the junction of Paul Street and Jalan Abdul Malek; the learned Magistrate neither declared that the public be excluded nor did he specifically invite members of the public to attend the trial. It was conducted in open thoroughfare to which the public had access. There was no exclusion of the public by the express direction of the Magistrate preventing attendance by the general public as in *Scott* v. *Scott* quoted by Mr. Rintoul. Whether a trial in those circumstances could be held to be illegal depends in my opinion entirely on the interpretation of section 7 of the Criminal Procedure Code which enacts:

> "the place in which any criminal court is held for the purpose of trying an offence shall be deemed an open court to which the public generally have access."

I observe here that the trial was not held in *camera* nor that the interpretation of the expression "the place in which any criminal court is held" is necessarily confined to the very building that has been set up by the State for the conduct of a trial. Unless any obstacle is placed in the way of the general public to access for the purpose of attending a trial (and there is no evidence to that effect) the place where the trial is held is declared to be an open court to which the public may generally have access within the meaning of section 7.

That is what the legislature has provided and it has stressed the fact that the place itself rather than the building is to be regarded as an open court. There is nothing in the Code which limits the right of the Court to conduct any inquiry or try any offence outside the Court building so long as the public are not specifically excluded. The function of the Court is limited to interpretation. The words "place" and "deemed to be" are destructive of Mr. Rintoul's argument that the trial must necessarily take place in the court house with open doors. The deeming section is, in the language of Thomson J. (as he then was) in *Tong Peng Hong* v. *Public Prosecutor*[3] "crystal clear and compelling". "Place" is defined in section 2 of the Criminal Procedure Code. It says "includes" which is a word of extension, not of restrictive definition, as was held in *Dilworth* v. *Commissioner of Stamps*[4]. There is nothing in the context which gives it a colour restricting it to the very court house with open doors in which such proceedings are normally held.

I confess I have come to the conclusion with great hesitation and with some reluctance, because I feel that where a proceeding affecting the freedom of the individual is concerned, is conducted albeit in an open space to which the public if so minded could have access, it is not the court house which is generally known to the public as the place of trial.

I am not prepared to agree with the learned Deputy that there was sufficient evidence of rash act within the meaning of section 304A of the Penal Code, but I am satisfied that the appellant is guilty of inconsiderate driving. I accordingly convict him on the lesser charge under section 5 of the B.M.A. Motor Vehicles (Driving Offences) Proclamation No. 42/46 and impose a fine of $100, in default two months' imprisonment. The difference between fine paid and this fine of $100 be refunded.

I feel this is a matter of considerable public importance and if any application is made to me by counsel for the appellant, I shall be prepared to refer the question of law for the determination of the Court of Appeal.

Sentence varied.

Solicitors: *Shearn Delamore & Co.*

MOHAMED IBRAHIM v. LIM TUAN HONG

[A. C. J. (Hepworth J.) May 26, 1960]

[Kuala Trengganu — Civil Appeal No. 12 of 1959]

Landlord and Tenant — Assignment of lease, whether effective — Trespasser — Claim for possession by landlord on death of tenant — No general denial under R.S.C. O.21 r.21 — Whether points of law not pleaded in Court below available to appellant — O.19 r.13.

The plaintiff/respondent was the landlord of one R., [deceased] the former tenant of the premises in dispute. R. had entered into an arrangement with the defendant/appellant by which the appellant paid off a part of R's debts to creditors. This arrangement was incorporated in an agreement to which R. and the appellant were parties. In accordance with this agreement which the appellant claimed was an assignment of K's tenancy, the appellant took possession of the premises prior to R's death. The plaintiff claimed that the appellant was in unlawful possession. Judgment was given to the

plaintiff on the ground that the agreement did not constitute an assignment.

On appeal, the appellant relied on two points of law which were not argued in the Court below and which did not appear specifically in the pleadings.

Held: there was no general denial of the plaintiff's title as provided for by 0.21 r. 21 and therefore as the points of law were not raised on the pleadings they were not available to the appellant.

Per curiam: Prior to the coming into force of the Probate and Administration Ordinance, 1959, on the 1st February, 1960, the property of a deceased person to which the Trengganu Enactment No. 22 of 1356 (1937) applied vested in no one until such time as a grant of administration was taken out in respect of it. Therefore, on the death of R. there was no one in whom the tenancy could vest and consequently it came to an end, the land reverting to the lessor. *Alagappa Chettiar* v. *Kader & Ors.* (1) distinguished.

Doctrine of relation back discussed.

Cases referred to:—

(1) *Alagappa Chettiar* v. *Kader & Ors.* [1939] M.L.J. 304; [1939] F.M.S.L.R. 145.

(2) *Danford* v. *McAnulty* (1883) 8 App. Cas. 456.

(3) *Warner* v. *Sampson & Anor.* [1959] 1 Q.B. 297; [1959] 2 W.L.R. 109; [1959] 1 All E.R. 120 at p. 123.

(4) *Chia Foon Sian & Anor. v. Lam Chew Fah & Anor.* [1955] M.L.J. 203.

(5) *Fred Long & Sons, Ltd.* v. *Burgess & Anor.* [1949] 2 All E.R. 484.

(6) *Hastings Corporation* v. *Letton & Anor.* [1908] 1 K.B. 378.

CIVIL APPEAL.

T. K. Sen (*Maidin bin Mohamed Ibrahim* with him) for appellant.

M. S. Miranda for the respondent.

Hepworth J.: This is an appeal from the decision of the President of the Sessions Court, Dungun, giving judgment for the plaintiff landlord in a claim for possession of premises No. 7, Jalan Pasar, Dungun. The plaintiff/respondent claimed that the defendant/appellant was unlawfully in possession of the premises and the defendant/appellant denied that he went into unlawful occupation of the premises and pleaded that he was in occupation of the premises by way of assignment of the tenancy of the premises by one K. Raghavan to him.

The said K. Raghavan had been the tenant of, and had carried on business at, the premises No. 7, Jalan Pasar, Dungun, of which the respondent was the landlord. The said K. Raghavan had got into financial difficulties culminating in March, 1958, when the appellant came to his rescue by persuading Raghavan's creditors to accept from the appellant a certain percentage of the amounts which were due to them from Raghavan. This arrangement was incorporated in an agreement to which Raghavan and the appellant were the parties and which was the document which was relied upon by the appellant as constituting an assignment to himself of the tenancy of the premises No. 7, Jalan Pasar, Dungun.

This agreement was dated the 22nd March, 1958, and the arrangement referred to resulted in Raghavan being indebted to the appellant in a considerable sum. On the 15th July, 1958, Raghavan died and at the date of his death the balance owing by him to the appellant was still in excess of $5,000.

The appellant claimed that, in accordance with the agreement, he took possession of the premises prior to Raghavan's death. There was considerable doubt on the evidence whether this was in fact the case, but for the purposes of this appeal I am going to assume that this was so because, on the view I take of this case, I do not think it matters one way or the other.

On the 13th November, 1958, Letters of Administration of the estate of the said K. Raghavan were granted to the appellant as a creditor. The Grant was extracted on the 17th November, 1959, just over a year later.

The President did not go so far as to say what he thought this agreement was but confined himself to stating that it was bad, whatever he meant by that, and that therefore the appellant was a trespasser. As a result he gave judgment for the respondent. I share the President's difficulty in reaching any conclusion as to what this document is and what it purports to achieve and I shall confine myself to saying that whatever it may be I am satisfied that it does not constitute an assignment of Raghavan's tenancy.

The appellant, however, although he argued that this agreement did constitute an assignment of the tenancy, argued as his main ground of appeal two points of law which were not mentioned in the Court below and do not appear specifically on the pleadings. The appellant argued that, even if there was no assignment, the President was wrong in law in granting possession to the respondent landlord because the appellant was a trespasser, because:—

(1) as the tenancy of the premises granted to Raghavan did not come to an end on his death (*Alagappa Chettiar* v. *Kader & Ors.*(1)) and was still in existence on the date of the grant of Letters of Administration, by virtue of the doctrine of relation back the grant was effective from the date of death and therefore the appellant was the tenant as Administrator, and

(2) as the tenancy of the premises granted to Raghavan did not come to an end on his death and as the respondent was a landlord not in possession, the tenant, if the appellant was not the tenant himself, was the only person who could take action against the appellant as a trespasser.

The respondent's reply to this argument was that:—

(1) As the point was neither pleaded nor argued in the Court below, it is not open to the appellant to argue it now.

(2) As the Letters of Administration were not extracted until the 17th November, 1959, and as judgment was given on the 24th September, 1959, and as therefore the appellant was not the Administrator at the time of the action *Alagappa Chettiar's case, supra,* is not applicable.

The respondent's submission that it is not open to the appellant to argue this point now because it was not pleaded must be dealt with first before considering the appellant's arguments. Apart from stating the bare submission the respondent's counsel produced no argument, rules or authorities to support his contention. I therefore found it necessary to make considerable research in order to ascertain whether or not the submission was well founded.

Order 19 rule 13 and Order 21 rule 21 are relevant.

Order 19 rule 13 reads:—

"Every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant or person of unsound mind."

Order 21 rule 21 reads:

"No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless he is in possession by virtue of a lease or tenancy granted by the plaintiff or his predecessor in title or his defence depends on an equitable estate or right or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession, and it shall be taken to be implied in such statement that he denies, or does not admit, the allegations of fact contained in the plaintiff's statement of claim. The defendant may in addition plead and rely upon any other ground of defence."

The effect of the general denial envisaged in Order 21 rule 21 is that the defendant is taken to be saying that he is in possession and that such possession is good against everyone except against a plaintiff who can show a better title. It puts the plaintiff to proof of his title as much as if the defendant had expressly denied, or had expressly stated that he did not admit, the whole and every one of the allegations contained in the plaintiff's pleading (see *Danford* v. *McAnulty*[2] and the observations of Lord Denning in *Warner* v. *Sampson & Anor.*,[3] (at page 123).

If the defence in this case had consisted of a general denial of the plaintiff's title as provided for by Order 21 rule 21 there would have been no objection to the point of law now raised being argued even though it was not specifically pleaded. However the statement of claim has alleged that the defendant went into occupation of the premises by virtue of the assignment of the tenancy, that is by the assignment of a tenancy agreement in respect of which the respondent was the landlord. If a defendant asserts that he is in possession of the land by the permission of the plaintiff (e.g. under a tenancy agreement as in this case) he thereby admits that the plaintiff had the right so to place him in possession (*Bullen and Leake's Precedents of Pleadings* 10th Edition page 40). If the plaintiff had the right to place the defendant in possession the defendant thereby admits the plaintiff's title at that date. It follows that there cannot be read into the defendant's pleading any general denial of the plaintiff's title. The decision of the House of Lords in *Danford* v. *McAnulty, supra* can therefore be of no assistance to the appellant in this case and accordingly I am of the opinion that as the points which it is now sought to argue were not raised on the pleadings they are not available to the appellant now. However, in case I am wrong in this I propose to deal with the appellant's arguments in case he wishes to take the matter further.

The appellant submitted that a weekly or monthly tenancy is not a succession of leases for a week or a month, but one of indefinite duration which exists until terminated by act of party or operation of law. Such a tenancy is an interest which is transmitted to personal representatives. (*Alagappa Chettiar* v. *Kader & Ors., supra*). As he had been granted Letters of Administration to the estate of Raghavan on the 13th November, 1958, he was from that date the Administrator of Raghavan's estate, regardless of the fact that the grant was not extracted until the 17th November, 1959, and he contended that by the doctrine of relation back the estate of the deceased Raghavan including his tenancy was vested in the appellant as from the date of Raghavan's death. He therefore argued that, quite apart from whether the agreement was an assignment or not, the appellant was as from the date of Raghavan's death the tenant of the premises and consequently was not a trespasser, and as no notice to quit had been given and the question of the application or otherwise of the Rent Control Ordinance had not been considered, the President had no power to make the order that he did.

Now *Alagappa Chettiar's case, supra*, was a Perak case and in considering the decision in that case the F.M.S. Probate and Administration Enactment Cap. 8 is relevant. Section 30 of that Enactment reads as follows:—

"30. From and after the decease of persons dying intestate and until letters of administration shall be granted in respect of their estates and effects, the estates and effects which were of such deceased persons shall be vested in the Official Administrator."

So that in places where this Enactment was operative a tenancy which on the authority of the *Alagappa Chettiar case, supra*, does not cease on the death of the tenant vests with effect from the date of the death in the Official Administrator.

The F.M.S. Probate and Administration Enactment Cap. 8 was repealed by the Probate and Administration Ordinance, 1959, which since 1st February 1960 applies to the whole of the Federation of Malaya and provides that where a person dies intestate his movable and immovable property until administration is granted in respect thereof vests in the Chief Justice. Then on the making of an order for a grant of administration by the Court all such property vests in the administrator.

Even before the Probate and Administration Ordinance, 1959, property vested in an Administrator on the date on which the order was made

and not on the date upon which the Grant was extracted (*Chia Foon Sian & Anor.* v. *Lam Chew Fah & Anor.* [4]).

The doctrine of relation back can be applied only to protect an estate from wrongful injury occurring in the interval between the death of an intestate and the grant of Letters of Administration and cannot be applied so as to invalidate interests lawfully acquired in the interval or so as to give the administrator a title to something which had been extinguished in the interval without fault on the part of anyone (*Fred Long & Sons, Ltd.* v. *Burgess & Anor.*[5]). In that case a contract of tenancy, which was vested in the President of the Probate and Divorce Division on the death of the tenant intestate (similar to the vesting in the Official Administrator and now the Chief Justice referred to above) was validly terminated by notice to quit served on the President, and it was held that the doctrine of relation back could not be applied so as to include in the subsequent grant of Letters of Administration the tenancy which had been extinguished. In the judgment of Bucknill L.J. in the Court of Appeal His Lordship had this to say:—

> "I think that on principle and historically the vesting of the estate in the President of the Probate, Divorce and Admiralty Division is a positive act with some legal substance. Normally the court, formerly composed of the probate judge, appoints a person or persons to deal with the property of the intestate through a grant of administration, but I see no reason why in a case of necessity the President should not have legal power to give directions about the property. If he cannot do so, no one can. That is why the property is vested in him."

Had the F.M.S. Probate and Administration Enactment Cap. 8 or the Probate and Administration Ordinance 1959 been in force in the State of Trengganu at the relevant time, then in my opinion the appellant's first point would have been sound. On death the property would have vested in the Official Administrator or the Chief Justice, as the case might be, and then on the grant of Letters of Administration would have vested in the Administrator. The landlord had taken no or no sufficient action to terminate the tenancy and the tenancy would still have been in existence, and by virtue of the grant of letters of administration would at the date of the judgment have been vested in the appellant. In these circumstances the respondent would not have been entitled to an order for possession and the respondent's claim would have to be dismissed.

However in this case at the relevant time the operative statute was the Probate and Administration Enactment No. 22 of 1356 (1937) of Trengganu. In that Enactment there appears no such provision as section 30 of the F.M.S. Probate and Administration Enactment nor as section 39 of the Probate and Administration Ordinance, 1959. The only provision in any way comparable is that contained in section 17 which reads as follows:

> "When any person dies leaving property in the State, the heir who is the proper person to take control of the property, or the agent of such heir, shall have control of the property for the period of 6 months only, calculated from the date of the death, and shall within such period prepare lists of the property and of the debts owed to and by the deceased; but he shall on no account charge or transfer by sale, gift, exchange or otherwise any part of the property or pay over any share thereof to any of the heirs, until such time as Probate or Letters of Administration have been granted by the Court."

Does the provision that the heir or his agent "shall have control of the property" mean that the property vests in him? I do not think it does. When dealing with the effect of the grant of probate or Letters of Administration section 40 of the Trengganu Enactment states that all the property of the deceased person "vests" in the administrator. I think the use of different words in sections 17 and 40 are intentional, and it is a rule of construction that where in the same statute and in relation to the same subject matter different words are used different meanings are intended.

The result appears to me to be that prior to the coming into force of the Probate and Administration Ordinance, 1959, on the 1st February, 1960, the property of a deceased person to which the Trengganu Enactment applied vested in no one until such time as a grant of administration was taken out in respect of it. If such be the case then on the death of Raghavan in this case there was no one in whom the tenancy could vest. I do not think that you can have a tenancy where there is no tenant in existence and that consequently this tenancy came to an end on the death of Raghavan. I think the decision of the High Court in England in its appellate jurisdiction in the case of *Hastings Corporation* v. *Letton & Anor.*[6] supports this view. In that case it was held that a lease to a corporation for a term of years determines if the corporation is dissolved without having assigned the lease. On dissolution of the corporation the lease does not vest in the Crown as *bona vacantia*, but the reversion is accelerated and the land reverts to the lessor. On the authority of the case of *Fred Long & Sons Ltd.* v. *Burgess, supra*, therefore the subsequent grant of Letters of Administration to the appellant does not operate by virtue of the doctrine of relation back to include in the estate the tenancy which had been extinguished.

As the tenancy was extinguished on the death of Raghavan the appellant's second point also fails.

The appeal is dismissed with costs.

Appeal dismissed.